Appendix A

OPINION OF STATE COURT.

District Court of Appeal
State of California
Third Appellate District

(Reported in 102 California Appellate Decisions (Advance Sheets), page 154; 104 Pac. (2d) Advance Sheets, page 119.)

Defendant was charged by an information in four counts with the crime of grand theft. (Section 484, Penal Code).

The first two counts were dismissed by the court. Count III charged in substance that "on or about the 12th day of December, 1938, * * * the defendant did * * * steal, take and carry away the sum of $250. * * * of the personal property of Fred M. Kay."

Count IV charged in substance that "on or about the 1st day of March, 1939, * * * the defendant did * * * steal, take and carry away the sum of $765.00 * * * of the personal property of Fred M. Kay."

After trial by jury the defendant was convicted upon Counts III and IV. This is an appeal from the judgment of conviction and from the order denying a new trial.

Fred M. Kay, the principal witness for the People in this case, had been county clerk of Humboldt County for nearly twenty-five years. Prior to that time he had been a deputy in that office for twelve years. At the time of the trial of the instant case

he was sixty-eight years of age. He had lived in Humboldt county practically all of his life. He ceased to be county clerk on March 14, 1939. Subsequently, on May 16, 1939, he was found guilty of embezzlement of public funds. The conviction was affirmed by this court. (People v. Kay, 34 Cal. App. (2d) 691).

During the summer of 1938, appellant discussed with Kay the subject of the Lander Hill Mining Company. Appellant, so Kay testified, stated that he had a typewritten report on the mine; that it was a very wonderful mine, mostly composed of silver ore, and situate near Austin, Nevada. On October 27th of the same year, the witness testified that the following conversation with appellant took place:

"* * * he said on October 27, 1938, he wanted some more money, and he said if I could raise a certain amount of money, I don't remember the exact amount now, that he would have 5000 shares of this Lander Hill Mining Company up here, and be able to turn it over to me the next day. And I asked him what we could do with that, and he says we could get some money on that stock; he says we could borrow money on it, plenty of money." The next day Kay paid appellant $465.00 on account of the deal. On December 12, 1938, he paid appellant the further sum of $250.00 for stock in said Company. The stock was never delivered to Kay, though he repeatedly demanded it, nor was the money returned. Kay stated that he had faith in appellant, who told him that he would be made president of the Company at a salary

of $500.00 per month. Appellant denied that any such payments were made to him, and stated that his reference to installing Kay as president of the Company was made in a joking manner. The amount paid on December 12th was borrowed, Kay testified, from W. T. Leroy. The latter corroborated that testimony.

On the theory of the admissibility of other similar transactions to prove a common scheme and design, and also the intent of defendant to commit the crime charged, Kay was permitted to testify concerning a number of other transactions between appellant and him, starting with the year 1933. The first was an investment of funds by Kay in a scheme connected with a patent three-dimension camera lens. Appellant received the money but never received any stock. The next was a timber deal, in which money was paid to appellant. Kay received nothing for his investment. The next was a paint deal. Appellant told Kay that a Los Angeles woman had a formula for paint to be used on the bottom of ships. Kay invested some funds in the scheme with appellant, and that was the end of it. The next enterprise was a corporation to build airplanes which was being promoted by appellant and other parties. The result was the same as in the other proposals. Kay received nothing for his money. The next was a mining venture. Appellant said he and several others had taken over a mine in Siskiyou County; that a corporation had been formed, and stock would be issued; that Kay would get a certain percentage of such stock. No stock was ever

delivered. The next scheme was a chemical plant to grind up redwood stumps. Kay gave appellant funds to be used in the enterprise. The next was a powder deal. Appellant introduced to Kay a man who had invented a certain kind of powder, and stated that a corporation would be formed to manufacture it. Kay gave appellant funds to be invested in the stock. No stock was ever delivered. The foregoing facts appear in the testimony of Kay. All evidence of former transactions between Kay and appellant, except the camera deal, was stricken out on motion of defendant.

It is contended that the evidence is insufficient to establish any offense, for the reason that the testimony of Kay is so inherently improbable that it must be rejected as a matter of law. Appellant points out that the payments made by Kay to appellant were established by *oral* evidence alone. That a person of ordinary intelligence would require a written receipt under such circumstances. Therefore, appellant urges, the whole story of Kay is utterly worthless as a matter of law. The failure to demand and receive a receipt, appellant contends, coupled with the bad character of Kay, stamp the testimony as inherently improbable. The rule, where an attack of this character is made upon the credibility of a witness, is set forth by this court in the case of People v. Jefferson, 31 Cal. App. (2d), 562-566:

> "The justices of an appellate court should not substitute their judgment for the conclusions of the jury and the trial judge and reverse a cause on the ground that the evidence of the prosecuting witness is inherently improbable, unless it is

> so clearly false and unbelievable that reasonable minds may not differ in that regard. To justify a reversal of a judgment on that ground it should clearly appear that the verdict is the result of passion and prejudice."

Applying the foregoing rule, we cannot say that the story of witness Kay is inherently improbable, and that the verdict therefore lacks any substantial support. The fact that the witness had been convicted of a felony was a proper ground for impeachment—(Section 2051 C.C.P.)—but it was for the jury to decide whether or not they would, in spite of his criminal record, still believe him. This witness did many acts which most normal people would not have done, but that does not render his testimony unworthy of belief. Just because the average person would have demanded and received a receipt for any money paid out under such circumstances, is no justification for condemning as false the testimony of one who did not exact a receipt under the circumstances. These are essentially questions for the consideration of the jury. The credibility of the witness is not a question of law in this case. The case of People v. Lamson, 1 Cal. (2d), 648, merely restates the familiar rule that where there is no substantial evidence to support a verdict, it is the duty of an appellate court to set it aside. The evidence in that case was entirely circumstantial, and the court followed the general rule by holding that where circumstantial evidence is relied upon for a conviction, and where every circumstance relied upon as incriminating is equally compatible

with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court. Here, the People rely, not upon circumstantial evidence, but upon direct evidence. It is not a matter of links in the chain of evidence, but whether or not the words of a witness are to be given any credence. It cannot be said that the Lamson case in any manner abrogates the old rule that the jury are the sole judges of the facts and of the credibility of the witnesses, and that if there is any substantial evidence to support a verdict, it will not be disturbed by an appellate court. We find such evidence in the record before us.

Appellant contends that "no conviction of either embezzlement or false pretenses can be sustained because the information charges larceny and nothing else". He states that one cannot be charged with one crime and convicted on a showing that he has committed another. Under the definition of *theft,* there is included the crimes of larceny, obtaining money, labor or property by false pretenses, and embezzlement. (Penal Code, Section 484). Section 952 of that Code provides that "* * * In charging theft it shall be sufficient to allege that the defendant 'unlawfully took' the labor or property of another". It is clear that the information here meets the requirement of the latter section. The question is not a novel one, but has been definitely settled adversely to the contention of appellant in the following cases:

People v. Fewkes, 214 Cal. 142; People v. Plumb, 88 Cal. App. 575; People v. Mason, 12 Cal. App. (2d)

84; People v. McNeil, 27 Cal. App. (2d) 352; People v. Robinson, 107 Cal. App. 211. We therefore hold that under the indictment before us, if the evidence showed defendant to have committed any or all of the three included offenses mentioned above, he could have been convicted of grand theft. The information as set forth above, charges the said three offenses under the express statutory form set forth in Section 952 of the Penal Code. The only case relied upon by appellant is People v. Walther, 27 Cal. App. (2d) 583. There, the defendant was convicted under a count in an information which attempted to set forth the crime of obtaining money by false pretenses. (Penal Code, Section 532). This court held that the information did not charge that crime, for the reason that it failed to specify any act or statement of the defendant constituting the alleged crime. No attempt was made in that case to charge the crime of theft under the provisions of Section 952 of the Penal Code. Neither did the court there take into consideration the provisions in said section that "It, (the count in the information or indictment), may be in the words of the enactment describing the offense." The discussion of this point may very properly be concluded with the following excerpt from People v. Plumb, supra:

> "Under the pretense of informing the defendant of the nature of the charge against which he was called upon to defend, it was necessary, at the ancient common law, to describe the means by which the homicide was committed, and the nature and extent of the wound and its precise locality;

from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. *It was a long time before legislators and judges discovered that this rule had nothing but the most flimsy pretext to support it. If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both, his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense.* (People v. King, 27 Cal. 507-510 (87 Am. Dec. 95; People v. Cronin, 34 Cal. 191, 200; People v. Fowler, 178 Cal. 657, 661 (174 Pac. 892).)"

Appellant next complains of a ruling of the trial court which denied him the right to make a statement at the close of the opening statement by the prosecution, but which permitted him to make such a statement when the prosecution had rested. He cites no authorities. There is nothing in the "Order of the Proceedings" set forth in the Penal Code, (Sec. 1093), which gives the defendant the right for which he here contends. It was a matter committed to the sound discretion of the trial court, and he cannot say here that such discretion was abused. Neither can we find that the ruling was prejudicial to defendant.

It is contended that the trial court erred in refusing to exclude any evidence tending to show the com-

mission of the offenses of embezzlement and obtaining money by false pretenses, and upon the ground that the indictment stated but one offense—larceny. This question has been fully discussed above. But one crime was expressly charged in each count—theft. Under that charge, evidence of the included offenses was clearly admissible.

During the testimony of Kay, the trial court admitted in evidence the following writing:

> "October 27, 1938. Jack told me today that tomorrow I would receive 5,000 shares of ..... stock, par value $100.00 per share and that I could transfer 2500 shares to ....., and receive $150.00; that within thirty days if I want to sell the remaining 2500 shares that I can get from a hundred and fifty thousand to two hundred thousand dollars for them. Fred M. Kay."

The witness testified that he made the memorandum on the day he had a conversation with defendant. While the witness had the right to refresh his memory from such memorandum, it is doubtful if the document itself was admissible as evidence. It is unnecessary to discuss the matter further, as it appears that the defendant, prior thereto, testified to all the facts contained in the memorandum. An identical situation arose in the case of People v. Allen, 37 Cal. App. 180-188, where this court said:

> "Under Section 2047 of the Code of Civil Procedure, a witness may 'refresh his memory respecting a fact, by anything written by himself,

> or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing.' But where the witness can and does testify fully as to the facts without resort to his memorandum, we do not think he can be corroborated by the introduction of his memorandum. We think, however, that the ruling was without prejudice. Section 4½ of Article VI of the Constitution would seem to apply here."

We can see no prejudice resulting from the ruling.

During the examination of Kay, on rebuttal, and over the objection of appellant, the trial court admitted in evidence a written memorandum made by Kay containing numerous items of money and a date opposite each item. The witness testified that they represented payments made to appellant in connection with a number of transactions between them. Elsewhere, the witness had testified that about one-half of his income, covering several years, and amounting to $7500.00, had been paid to appellant. The items admitted covered the same ground, but contained more detail. Assuming that the list of items was not admissible, no prejudice resulted from the ruling. The matter was already substantially in evidence, though not in the same form. What we have said also applies to a small memorandum book containing items showing similar payments by the witness to appellant. All of such items were included in the $7500.00 total mentioned.

It is contended that the evidence is insufficient to prove theft or any of the crimes included in the charge, to-wit: larceny, obtaining money by false pretenses, and embezzlement. We are satisfied that the evidence sustains a conviction of theft committed by means of embezzlement. The latter offense is defined as "the fraudulent appropriation of property by the person to whom it has been entrusted." (Penal Code Sec. 503). The jury could reasonably conclude from the evidence that the sums of $250.00 and $765.00 were entrusted to appellant for the purpose of purchasing stock in Lander Hill Mining Company, and that he fraudulently appropriated such money. The stock was never purchased or delivered. There is evidence in the record of a similar scheme used by appellant to get money from Kay. It may be designated as the "Griffith Camera Lens" deal, and is mentioned above. There is also the testimony of parties who loaned money to Kay, which tends to corroborate his testimony. According to the record, Kay entrusted money to appellant on two occasions to be used for the purchase of stock in Lander Hill Mining Corporation. The stock was never delivered, nor was the money returned. In our opinion a plain case of embezzlement was made out. Defendant acted as agent for Kay, and it was his duty to use the money entrusted to him in payment of the stock. The following cases, based upon similar transactions, hold that embezzlement was the proper charge to make: People v. Meadows, 92 N.E. 128—199 N.Y. 1; State

v. Monahan, 249 Pac. 566, ... Nevada .....; State v. Cooke, 278 Pac. 936, ... Ore. ..... Appellant urges that the testimony shows that the money was not handed to appellant for any specific purpose; hence the crime of embezzlement was not proven. He relies upon a statement made by Kay on a former occasion, from which the jury might reasonably understand that the use to which the money was to be applied was not mentioned when the payments were made. On the other hand, at the trial of this action, Kay testified that appellant said the stock would be delivered "the next day". If Kay's testimony on the point was contradicted by a former statement, it was still a matter for the jury to say whether he was telling the truth or not in testifying before them, and we cannot disturb any conclusion which they may have reached on the question of the credibility of the witness.

It is contended that evidence of former transactions between the parties was inadmissible. All testimony of that character, except that relating to the camera deal, was stricken out on motion of defendant. We believe that all of such evidence was admissible. It covered a period of several years, and clearly disclosed a scheme or design upon the part of appellant to mulct Kay of his money. Such evidence is justified under the rule that:

> "Where several crimes are connected as part of one scheme or plan, all of the same general character, and tending to the same common end, they may be given in evidence to show the process or motive and design leading up to the particular

> crime for which the prisoner is being tried, and thus directly tending to show logically that the crime in question was a part of such common scheme. If the general crimes are part of a chain of cause and in consequence so linked as to be necessarily connected with the system or general plan, they are admissible." (8 Cal. Juris., page 69, Sec. 173).

This rule was applied in People v. Ruef, 14 Cal. App. 576. It is very thoroughly discussed in People v. McGill, 82 Cal. App. 98.

It is urged that the District Attorney was guilty of prejudicial misconduct. After an examination of the record, we cannot say that the District Attorney went beyond the limit of propriety and fairness, or that he did anything to wilfully injure or prejudice the defendant in the eyes of the jury. (People v. Wiley, 97 C.A.D. 845-847).

It is urged that Sections 484 and 952 of the Penal Code are unconstitutional as being in violation of the due process clause of the Constitution of the United States, (Fourteenth Amendment), in that an information drawn thereunder gives the defendant no information as to the nature of the accusation against him. This question was decided adversely to appellant in the case of People v. Robinson, 107 Cal. App. 211, where a hearing was denied by the Supreme Court. The motion in arrest of judgment was therefore properly denied.

Other points are raised as grounds for reversal. We have examined them and find such contentions are

so obviously without merit as to require no discussion of them.

The judgment and order denying motion for new trial are, and each of them is, affirmed.

Tuttle, J.

We concur:
Thompson, J.
Pullen, P. J.

Filed July 2, 1940,
Cavins Hart, Clerk.

Appendix B

PERTINENT EXCERPTS FROM THE OPINION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT IN PEOPLE v. PLUM, 88 CAL. APP. 575, 263 PAC. 862, 265 PAC. 332.

"Appellants contend that under the provisions of section 484 of the Penal Code theft 'may be committed in four different ways'; that the information charges 'theft by asportation' and that 'the crime proved is that of obtaining property under false pretenses, which, under section 484 . . . is the third method, or mode . . . of committing theft.' Section 484 was amended at the last session of the legislature (Stats. 1927, p. 1046, sec. 1), for the purpose of avoiding such contentions as appellants make. In so far as applicable to the facts of this case it reads as follows:

" 'Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money or property or obtains the labor or service of another, is guilty of theft.'

"At the same session section 952 was amended (Stats. 1927, p. 1043) to provide: 'In charging theft it shall be sufficient to allege that the defendant un-

lawfully took the property of another.' If the words 'steal and carry away' were omitted from the information it would be in the precise form prescribed by the statute. It is not perceived that the defendants have suffered any possible prejudice from the use of those words in the charge and they may be treated as surplusage. Under similar provisions of the statutes of Massachusetts it is said that the effect 'is to put it beyond a doubt that the former crimes of larceny, embezzlement, and the obtaining of property by false pretenses, are now merged into the one crime of larceny . . . This legislation was intended to do away with the possibility of a criminal indicted for one of the three crimes mentioned escaping punishment by reason of its being afterwards found that his crime was technically one of the other two mentioned. A typical case of this kind is Commonwealth v. O'Malley, 97 Mass. 584. In that case the defendant had obtained by a trick possession of the money of an ignorant woman for a temporary purpose, and had fraudulently converted it to his own use. He had been prosecuted for larceny, but had obtained an acquittal because the judge before whom he was tried believed his crime to have been embezzlement. He was then indicted for embezzlement, and was convicted. But it was held by this court that his offense was really larceny and not embezzlement, and he was thus enabled wholly to escape punishment. It was the object of the legislature to prevent for the future similar scandals in the administration of justice, by doing away with the merely technical difference between

three cognate and similar offenses. The only way in which this reformatory intent can be effectuated is to allow the jury, upon the material facts which are the ground of a charge of larceny, to consider whether these facts show a taking of money or other property, by trespass from the possession of its owner, a fraudulent conversion of it while properly in the possession of the wrongdoer, or an obtaining of it by criminal false pretenses, . . . and in either of these cases to convict of larceny.' (Commonwealth v. King, 202 Mass. 379, 388 (88 N. E. 454).) Adapting the language of the King case, the effect of section 484 of the Penal Code is that the former crimes of larceny, embezzlement, and obtaining property by false pretenses are merged into the one crime of theft. A statutory form of charging such crime of larceny, substantially as provided by section 952, was upheld in Commonwealth v. Farmer, 218 Mass. 507 (106 N. E. 150), and Commonwealth v. Carver, 224 Mass. 42 (112 N. E. 481). In the Farmer case, where the defendants had obtained property by false representations, it is said: 'The indictments in all counts followed the short forms set forth in the criminal pleading act, R.L., c. 218. The constitutionality of the statute in this respect has been sustained in several decisions. It now is unnecessary to do more than summarize the conclusions reached. The word "steal" used in the indictment for larceny has become a term of art and includes the criminal taking of personal property either by larceny, embezzlement, or false pretenses . . . The provisions of R. L., c. 218, par. 39, require a bill of

particulars setting out adequate details where the indictment alone does not sufficiently inform the defendants, and this as a matter of right.' In People v. Hanaw, 107 Mich. 337 (65 N. W. 231), it is said: 'We think that it is within the power of the legislature to prescribe the form of indictments, keeping in view the constitutional right asserted in this case; and where, as in embezzlement, a defendant has a right to have the charge made certain by examination or by bill of particulars, it cannot be said that he is not informed of the nature of the charge.' (See, also, Commonwealth v. Bennett, 118 Mass. 443, 452; Commonwealth v. Wakelin, 230 Mass. 567 (120 N. E. 209), and State v. Hodgson, 66 Vt. 134 (28 Atl. 1089).) Sections 870 and 925 of the Penal Code require that the testimony in a criminal case taken at a preliminary examination or given before a grand jury be taken down by a stenographic reporter and, in the event of the commitment of the defendant for trial or his indictment, that he be furnished with a transcript thereof. Such transcript, together with the indictment or information, certainly informs the defendant of the nature of the charge against him as fully as would a bill of particulars."

"A petition for a rehearing of this cause was denied by the district court of appeal on February 21, 1928, and the following opinion then rendered thereon:

"FINCH, P. J.—In their petition for a rehearing the appellants, referring to the last sentence of section 952 of the Penal Code (Stats. 1927, p. 1043), quoted in the original opinion, say: 'The enactment,

providing that the allegation of "unlawfully took" shall be sufficient to charge all the acts constituting theft, . . . not only fails to allege the elements of the crime of theft, but alleges an act which might and ordinarily does not constitute a crime at all.' Section 952, however, must be read in connection with section 951, both enacted at the same session of the legislature. Section 951 provides:

"'An indictment or information may be in substantially the following form: . . . The grand jury (or the district attorney) of the county of....., hereby accuses A. B. of a felony (or misdemeanor), to-wit: (giving the name of the crime, as murder, burglary, etc.), in that on or about the ..... day of....., 19....., in the county of....., State of California he (here insert statement of act or omission, as for example, "murdered C. D.").'

"The information in this case, the charging part of which is set out in the original opinion, is in substantial compliance with the prescribed form, and it is clear that 'grand theft' always constitutes a crime. In an early case it was said: 'Our criminal code was designed to work the same change in pleading and practice in criminal actions which is wrought by the Civil Code in civil actions. Both are fruits of the same progressive spirit which, in modern times, has endeavored at least to do away with the mere forms and technicalities of the common law which were productive of no good, and frequently brought the administration of justice into contempt by defeating its ends. Under the pretense of informing

the defendant of the nature of the charge against which he was called upon to defend, it was necessary, at the ancient common law, to describe the means by which the homicide was committed, and the nature and extent of the wound and its precise locality; from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. It was a long time before legislators and judges discovered that this rule had nothing but the most flimsy pretext to support it. If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense.' (People v. King, 27 Cal. 507, 510 (87 Am. Dec. 95); People v. Cronin, 34 Cal. 191, 200; People v. Fowler, 178 Cal. 657, 661 (174 Pac. 892).) From purely theoretical considerations it might be exceedingly important for the indictment or information to set forth the manner in which the alleged murder was committed and the means by which it was accomplished, thereby informing the defendant of the particular facts against which he will be required to defend at the trial. Theoretically, a defendant may learn during the progress of the trial, for the first time, that the prosecution relies for a conviction upon proof that the alleged murder was committed by means of poisoned candy sent from a

distant state, by some subtle process or means at or near the scene of the crime, or through an accomplice, but experience has demonstrated that, from a practical standpoint, the rule requiring an indictment or information to set forth such particulars has 'nothing but the most flimsy pretext to support it,' and it is now 'the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case.' (People v. Witt, 170 Cal. 104, 107 (148 Pac. 928).) There may be technical objections to the short form of indictment or information under discussion, but when a defendant charged with grand theft as defined by section 484, has been furnished a copy of all the testimony taken at the preliminary examination or given before the grand jury, a rule requiring the indictment or information to state more than is required by sections 951 and 952 would have 'nothing but the most flimsy pretext to support it.' The extreme technicalities of the old common law are no longer followed in the English practice. The English Larceny Act, 1916, provides for a short form of indictment in charging simple larceny and more particular averments in a charge of obtaining property by false pretenses. (Archbold's Criminal Pleading, Evidence & Practice, 25th ed., 491, 669.) 'The distinction between larceny and obtaining by false pretenses is now little more than academic, because of the provisions of 6 & 7 Geo. 5, C. 50, s. 44, sub. ss. 3, 4.' 'On the trial of an indictment for stealing the jury may . . . find the

defendant guilty of embezzlement or of fraudulent application or disposition, as the case may be. . . . If on the trial of any indictment for stealing it is proved that the defendant took any chattel, money, or valuable security in question in any such manner as would amount in law to obtaining it by false pretenses with intent to defraud, the jury may acquit the defendant of stealing and find him guilty of obtaining the chattel, money, or valuable security by false pretenses, and thereupon he shall be liable to be punished accordingly.' "

"A petition by appellants to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 22, 1928.

"All the Justices present concurred."

CALIFORNIA STATUTES REFERRED TO BUT NOT QUOTED IN PETITION OR BRIEF.

(The figures hereafter appearing in parentheses refer to the pages of Deering's Penal Code of California, Bancroft Whitney Company, San Francisco, 1937.)

Section 494 (178):

"*Written instruments completed but not delivered.* All the provisions of this chapter apply where the property taken is an instrument for the payment of money, evidence of debt, public security, or passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the makers thereof to any person as a purchaser or owner."

Section 495 (178):

"*Fixture or part of realty severed at time of taking.* The provisions of this chapter apply where the thing taken is any fixture or part of the realty, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at some previous time."

Section 496c (181):

"*Copying information relating to title to realty without consent of owner: Inducement to copy or receipt of copy: Contents of paper declared to be property: Determination of value.* Any person who shall copy, transcribe, photograph or otherwise make a record or memorandum of the contents of any private and

unpublished paper, book, record, map or file, containing information relating to the title to real property or containing information used in the business of examining, certifying or insuring titles to real property and belonging to any person, firm or corporation engaged in the business of examining, certifying, or insuring titles to real property, without the consent of the owner of such paper, book, record, map or file, and with the intent to use the same or the contents thereof, or to dispose of the same or the contents thereof to others for use, in the business of examining, certifying, or insuring titles to real property, shall be guilty of theft, and any person who shall induce another to violate the provisions of this section by giving, offering, or promising to such another any gift, gratuity, or thing of value or by doing or promising to do any act beneficial to such another, shall be guilty of theft; and any person who shall receive or acquire from another any copy, transcription, photograph or other record or memorandum of the contents of any private and unpublished paper, book, record, map or file containing information relating to the title to real property or containing information used in the business of examining, certifying or insuring titles to real property, with the knowledge that the same or the contents thereof has or have been acquired, prepared or compiled in violation of this section shall be guilty of theft. The contents of any such private and unpublished paper, book, record, map or file is hereby defined to be personal property, and in determining the value thereof for the purpose

of this section the cost of acquiring and compiling the same shall be the test."

Section 502½ (183):

"*Removal of structures or fixtures from mortgaged real property without consent.* Every person who, after mortgaging or encumbering by deed of trust any real property, and during the existence of such mortgage or deed of trust, or after such mortgaged or encumbered property shall have been sold under an order and decree of foreclosure or at a trustee's sale, and with intent to defraud or injure the mortgagee or the beneficiary or trustee, under such deed of trust, his representatives, successors or assigns, or the purchaser of such mortgaged or encumbered premises at such foreclosure or trustee's sale, his representatives, successors or assigns, takes, removes or carries away from such mortgaged or encumbered premises, or otherwise disposes of or permits the taking, removal or carrying away or otherwise disposing of any house, barn, windmill, water tank, pump, engine or other part of the freehold that is attached or affixed to such premises as an improvement thereon, without the written consent of the mortgagee or beneficiary, under deed of trust, his representatives, successors or assigns, or the purchaser at such foreclosure or trustee's sale, his representatives, successors or assigns, is guilty of larceny and shall be punished accordingly."

Section 504 (185):

"*Fraudulent appropriation or secretion of property by officer, servant or agent of state or subdivision or*

public or private corporation, association or society. Every officer of this state, or of any county, city, city and county, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession, or under his control by virtue of his trust, or secrets it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

Section 504a (185):

"*Fraudulent removal, concealment or disposition of personalty held under lease or unfulfilled contract of purchase.* Every person who shall fraudulently remove, conceal or dispose of any goods, chattels or effects, leased or let to him by any instrument in writing, or any personal property or effects of another in his possession, under a contract of purchase not yet fulfilled, and any person in possession of such goods, chattels, or effects knowing them to be subject to such lease or contract of purchase who shall so remove, conceal or dispose of the same with intent to injure or defraud the lessor or owner thereof, is guilty of embezzlement."

Section 505 (185):

"*Fraudulent appropriation by carrier.* Every carrier or other person having under his control per-

sonal property for the purpose of transportation for hire, who fraudulently appropriates it to any use or purpose inconsistent with the safe-keeping of such property and its transportation according to his trust, is guilty of embezzlement, whether he has broken the package in which such property is contained, or has otherwise separated the items thereof, or not."

Section 506 (185):

"*Fraudulent appropriation or secretion by person entrusted with or controlling property for use of another: Misappropriation by contractor: Payment of laborers and materialmen declared use of contract price.* Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise entrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, and any contractor who appropriates money paid to him for any use or purpose, other than for that which he received it, is guilty of embezzlement, and the payment of laborers and materialmen for work performed or material furnished in the performance of any contract is hereby declared to be the use and purpose to which the contract price of such contract, or any part thereof, received by the contractor shall be applied."

Section 506a (186):

"Collector deemed agent or person and punishable under preceding section: Word defined. Any person who acts as collector, or acting in any capacity in or about a business conducted for the collection of accounts or debts owing by another person, and who violates the provisions of section five hundred six of the Penal Code, shall be deemed to be an agent or person as defined in said section five hundred six of the Penal Code, and subject for a violation of the provisions of said section five hundred six of the Penal Code, to be prosecuted, tried, and punished in accordance therewith and with law.

"And the word collector herein set forth shall also include and be held to mean every such person who collects, or who has in his possession or under his control property or money for the use of any other person, whether in his own name and mixed with his own property or money, or otherwise, or whether he has any interest, direct or indirect, in or to such property or money, or any portion thereof, and who fraudulently appropriates to his own use, or the use of any person other than the true owner, or person entitled thereto, or secrets such property or money, or any portion thereof, or interest therein not his own, with a fraudulent intent to appropriate it to any use or purpose not in the due and lawful execution of his trust."

Section 507 (187):

"Fraudulent conversion or secretion of property by bailee, tenant, lodger or attorney in fact. Every per-

son entrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use or secretes it or them with a fraudulent intent to convert to his own use, is guilty of embezzlement."

Section 508 (187):

"*Fraudulent appropriation or secretion of property by clerk, agent or servant.* Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement."